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No. 90-1678

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE STATE OF COLORADO
Petitioner

v.

PHILIP LESLIE GALIMANIS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

BRIEF OF AMICUS CURIAE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI LISTED ON THE INSIDE COVER* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

1. Whether Wainwright v. Greenfield, 474 U.S. 284 (1986), allows use of a defendant's request for counsel to rebut evidence offered in support of an insanity defense?[1]

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[1]This case presents a second important issue concerning whether mention of the defendant's invocation of silence at the sanity hearing constituted harmless error. The second issue is beyond the scope of this brief.

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INTEREST OF AMICI CURIAE

Amici curiae are States, each of which views a criminal defendant's request for counsel made near the time of the crime as highly relevant to a determination of the defendant's insanity defense. The decision of the Colorado Court of Appeals disallowing such evidence threatens to deprive state prosecutors of evidence necessary to a just determination of an insanity defense. The amici States accordingly support the State of Colorado in urging this Court to review the Colorado Court of Appeals' decision.

State criminal justice systems provide varying approaches to the defense of insanity. In Colorado, as well as in 13 other states,[2] the issues raised by

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[2] See Petition for certiorari, p. 9 n.2, collecting statutes.

a plea of not guilty by reason of insanity must be tried to a separate jury. Most states, like amicus curiae Pennsylvania, do not mandate a bifurcated procedure.[3]

The tests applied for determining criminal responsibility vary[4] as do the assignment of the burden of persua-

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[3]See e.g. Pa.Stat.Ann. tit. 50, § 7404 (Purdon Supp. 1990)(allowing bifurcation "in the interest of justice" and directing that the trial court "consider the substantiality of the defense of lack of responsibility and its effect upon other defenses, and the probability of a fair trial.")

[4]Under the rules established in M'Naughten's Case, 10 Clark and S. 200, 8 Eng. Reprint 718 (1843), the test of mental responsibility is whether the accused "was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong." The rules of M'Naughten's case have been widely adopted and remain the test of criminal insanity in many states. See e.g. 18 Pa.Cons.Stat.Ann. § 314(e)(2), (d) (Purdon 1983). In Colorado where this case arises, the M'Naughten Rule as

sion and the standard of the burden of proof.[5] Regardless of which procedure or which test of criminal

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[4](Continued) modified by the irresistible impulse doctrine applies. See Colo. Rev. Stat. § 16-8-101 (1986); People v. Wright, 648 P.2d 665 (Colo. 1982). Other states have adopted the Model Penal Code test for insanity under which a person is not responsible for his criminal conduct "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Model Penal Code § 4.01 (1985) See e.g. Conn. Gen. Stat. § 53a - 13 (rev. to 1991); State v. Torrence, 196 Conn. 430, 493 A.2d 865 (1985). Of course, numerous states, like amicus Pennsylvania, now also provide an alternative verdict of guilty but mentally ill, 18 Pa.Cons.Stat.Ann. § 314 (Purdon 1983).

[5]See e.g. Colorado which requires that once any evidence of insanity is introduced at trial, the burden of proof is on the People to prove sanity beyond a reasonable doubt. Colo. Rev. Stat. § 16-8-101 (1986); People v. Wright, 648 P.2d 665 (1982); cf. Leland v. Oregon, 343 U.S. 790 (1952) (upholding then widespread practice of requiring the defense to prove insanity beyond reasonable doubt).

responsibility a State applies, there is always a presumption of sanity. The defendant must interject the issue of his sanity into the proceeding.

Once an insanity defense is raised, the State unquestionably has a "legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest...." Wainwright v. Greenfield, 474 U.S. 284, 295 (1986). The trial court's statement in Galimanis -- that "all actions, words, conduct of the defendant are certainly relevant to the determination of the jury of sanity or insanity at the time of the events" (Pet. at p.6)--is a reflection of the universally accepted view in favor of admitting "all possible relevant evidence" on the difficult issue of insanity. United States v. Hartfield, 513 F.2d 254, 260 (9th Cir. 1975). Insanity, more than

any other defense, exemplifies the need, "when balancing the interests involved [to] weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." Michigan v. Tucker, 417 U.S. 433, 450 (1974).

The Colorado Court of Appeals' decision unnecessarily restricts the admissibility of relevant evidence through an improper and overly expansive reading of this Court's decision in Wainwright v. Greenfield, supra. For this reason, amici request that this Court grant certiorari.

ARGUMENT

A Prosecutor's Use of a Defendant's Request for Counsel, as Evidence of His Ability to Distinguish Right from Wrong, Does Not Deprive the Defendant of Due Process.

In People v. Galimanis, 765 P.2d 644 (Colo. App. 1988), the Court held that a new trial as to the sanity issue was required where the prosecution offered the defendant's assertion of his right to an attorney as probative of the defendant's sanity. The Galimanis majority held that this Court's decision in Wainwright v. Greenfield, 474 U.S. 284 (1986) "mandates reversal of defendant's sanity adjudication." Id. at 647. This reading of Greenfield treats evidence of a defendant's post - Miranda warning statements as equivalent to comments on a defendant's silence. This result is not mandated by Greenfield, is explicitly contrary to the approach taken

in the Greenfield concurrence, and conflicts with the decision of the State Supreme Court of amicus curiae Pennsylvania in Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), cert. denied, 110 S.Ct. 1124 (1990).

1. In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that the prosecution cannot use statements of an accused made during custodial interrogation unless the accused is advised, inter alia, of his rights to silence and counsel. In Doyle v. Ohio, 426 U.S. 610 (1976), this Court held that the silence of an accused cannot be introduced into evidence for impeachment purposes. Such a use would be fundamentally unfair given the fact that the Miranda warnings are an implicit promise "that silence will carry no penalty." Id. at 618.

Fundamental fairness also prohibits a prosecutor from arguing that a

defendant's post-Miranda-warnings silence constitutes evidence of sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). As concerns evidentiary use of a defendant's silence in a unitary trial, Greenfield controls. However, the Court made a sweeping statement that:

> What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.

Id. at 295. This statement is dicta in the context of a defendant's exercise of the right to counsel.

Although the Greenfield decision turned upon the "breach [of] the officers' promise to [the accused] by using his post arrest, post-Miranda warnings silence as evidence of his sanity[,]" id. (emphasis supplied), the Court, in a footnote stated "that

silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Id. at n.13. This statement, which arguably was not necessary to the outcome in Greenfield, is the genesis of the Court of Appeals' error in this case.

2. Two justices, then Chief Justice Burger joining now Chief Justice Rehnquist, found error in an analysis that assumes that "conduct and statements following the warnings, such as his requests for a lawyer, should be treated the same as silence." Id. at 297 (Rehnquist, J. concurring). The same error is present in the Galimanis decision.

Unlike silence, a request for counsel is not "insolubly ambiguous" and no inference of guilt arises from exercise

of the right to counsel. Id. at 297. A request for a lawyer "is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not incoherent or obviously confused or unbalanced. While plainly not conclusive proof of sanity, the request for a lawyer, like other coherent and responsive statements made near the time of the crime, is certainly relevant." Id.

Admitting evidence of an accused's request for a lawyer is not fundamentally unfair:

> Nor does the "unfairness" prong of Doyle, based on the implicit assurance in the Miranda warnings that "silence will carry no penalty," bar prosecutorial comment on respondent's requests for a lawyer... The logical corollary of this warning--that what respondent does say can be used against him--is that what he does not say cannot.

Id. at 298. No penalty flows from the use of the accused's request for counsel to show his knowledge of right from wrong.

The important distinction between evidence of silence and evidence of a request for counsel recognized by the concurrence was not determinative in Greenfield. Instead, the prosecutor's comments on the defendant's silence required a new trial.

3. This distinction was key to the decision in Commonwealth v. Hunsberger, 523 Pa. 92, 565 A.2d 152 (1989), cert. denied, 110 S.Ct. 1124 (1990). To rebut Hunsberger's insanity defense, the prosecution intended to offer statements made by the defendant after he received Miranda warnings in which the defendant sought "to elicit information regarding either his attorney or the obtaining of an attorney." Id. at 97, A.2d at 155.

Characterizing the statements as voluntary and spontaneous, the Pennsylvania Supreme Court considered the applicability of Wainwright v. Greenfield:

> It is clear that the common thread which runs throughout Wainwright is emphasizing the silence of the defendant or of his exercise of that right. In the case before us, however, we are not faced with Appellee's silence, but with his comments made following the invocation of his right to remain silent.
>
> * * *
>
> The statements in question ...cannot remotely be indicative of the Appellee's intent to remain silent. They are neither utterances which in and of themselves can be deemed inculpatory, nor were they elicited by questions solicited by authorities following Appellee's expression of his intent to invoke his Fifth Amendment rights.
>
> It is only statements which directly bear upon that right...which are safeguarded by the Fifth Amendment and Wainwright.

Id. at 95-97, A.2d at 154-55. The Pennsylvania Supreme Court reversed the

order which suppressed the defendant's statements about access to counsel.

Pennsylvania's Supreme Court is not alone in its view that Greenfield does not bar evidence of a request for counsel. See State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988) (defendant's request for attorney during court-ordered psychiatric examination was admissible as evidence of sanity).

4. These States have properly considered and resolved the issue in favor of the admissibility of what Justice Rehnquist denominated "highly relevant" evidence. Greenfield, supra, at 297 (Rehnquist, J., concurring). Admission of an accused's statement seeking counsel does not penalize the accused, but suppression penalizes the State by precluding use of probative evidence. The Colorado Court of Appeals applied Greenfield too expansively and

without regard to the strong public policy favoring reliable and just determinations of sanity. As the Court in Hunsberger opined:

> the key to maintaining the rights bestowed upon citizens by the Constitution is applying them in a manner which does not allow them to be a shield for conduct not contemplated or which is merely tangentially related.

Commonwealth v. Hunsberger, 523 Pa. 92, 96, 565 A.2d 152, 154. The Colorado Court of Appeals' decision conflicts with this principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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